BEFORE THE

SURFACE TRANSPORTATION BOARD

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STB EX PARTE NO. 575

Review of Rail Access and Competition Issues
Renewed Petition of the Western Coal Traffic League

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COMMENTS OF
MONTANA WHEAT & BARLEY COMMITTEE
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
NEBRASKA WHEAT BOARD
OKLAHOMA WHEAT COMMISSION
SOUTH DAKOTA WHEAT COMMISSION
TEXAS WHEAT PRODUCERS BOARD
WASHINGTON WHEAT COMMISSION
NATIONAL ASSOCIATION OF WHEAT GROWERS

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I. INTRODUCTION

The MONTANA WHEAT & BARLEY COMMITTEE, COLORADO WHEAT ADMINISTRATIVE COMMITTEE, IDAHO BARLEY COMMISSION, IDAHO WHEAT COMMISSION, NEBRASKA WHEAT BOARD, OKLAHOMA WHEAT COMMISSION, SOUTH DAKOTA WHEAT COMMISSION, TEXAS WHEAT PRODUCERS BOARD, WASHINGTON WHEAT COMMISSION AND NATIONAL ASSOCIATION OF WHEAT GROWERS (known as Wheat & Barley Commissions) welcomes the opportunity to file Comments on Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League as outlined in the June 1, 2006 Request for Comments. This is a fo-

cused effort by the Wheat & Barley Commissions in this proceeding because of the importance that federal regulatory oversight of railroads or lack of it, bears on the marketing and transportation of wheat and barley. Your Wheat and Barley Commissions have filed together and participated in various Ex Parte proceedings in the past and they welcome the opportunity to address a broad range issues in this proceeding. The past, present and future of regulatory oversight affects the daily lives of this nation's wheat and barley producers.

II. IDENTITY AND INTEREST OF WHEAT & BARLEY COMMISSIONS

The Wheat & Barley Commissions represent wheat and barley producers in the major wheat and barley producing areas of the United States. They represent the majority of wheat and barley production. The Wheat & Barley Commissions are charged with representing the interests of wheat and barley producers in the marketing of their grains both domestically and internationally. A vast majority of the wheat and barley producers represented by the Wheat & Barley Commissions are captive to rail carriers for significant portions of their freight shipments.

III. WHEAT & BARLEY PRODUCERS ARE THE ONES WHO BEAR THE FREIGHT CHARGES IN THE TRANSPORTATION OF GRAIN

For the layman, a simplistic discussion of how wheat is marketed will illustrate the product flow and the importance that transportation rate levels play as a price determinant of agricultural commerce. Wheat is sold by growers through local country elevators or grain sub-terminals located in the various states and subsequently transferred to merchandisers and exporters. The wheat is delivered by a farm producer to a local elevator. The producer is given the Grain Exchange price (basis), less rail transportation charges, less deduction for elevation and margin. For example, if the price of wheat at the market is $4.00 and the

transportation price is $1.00 and elevation is $.15, the farm producer would receive $2.85 for his wheat. *Thus, the farm producer bears the transportation costs of moving the wheat to market*. The grain merchandiser pays the railroad, but the farm producer is the bearer of freight rates. There are many grain companies that may profess to paying the freight bills, but the party that bears the freight charges are the ones this Board should be protecting in the marketplace.

For the farm producer, the cost of transporting grain can represent as much as one third (1/3) the overall price received for the grain. The key to understanding the uniqueness of the farm producers plight is to understand: unlike virtually every other industry, the farm producers bear the freight charges and cannot pass them on to any other party in the distribution chain, and yet the farm producer does not physically pay the freight charges.

IV. THE STB CAN CHOOSE IN THIS CASE ONE OF TWO PATHS

Here are the paths that this Board can follow:

1. Allow the Class I's to continue to spin off lines and exert absolute control through devices such as paper barriers and continue to allow the Class I's to restrict and create a burden on interstate commerce by these actions or
2. Allow the fostering on competition, abeit limited, as envisioned under the National Transportation Policy: Title 49, Subtitle IV, Part A, Chapter 101: Section 10101 – Rail Transportation Policy. "In regulating the railroad industry, it is the policy of the United State Government

    1. to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

4. to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
5. to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
6. to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

Why are there two clearly different paths available to the STB?

The railroads are showing record profits which is being accompanied by ever tightening capacity. The Staggers Rail Act of 1980 sought a balancing of interests between healthy railroads (which railroads have achieved) and effective regulatory oversight to protect those shippers left without effective railroad competition. The Board clearly has a responsibility not just with the railroads financial health but equally with the shipping public. Railroads today in America are not the ones that need protection from rail-to-rail competition – it is the captive rail shipper that needs protection from the lack of rail-to-rail competition. In recent testimony before the Senate Surface Transportation Subcommittee of the Senate Commerce Committee, the GAO urged Congress to study further the captive

shipper issue while seriously questioning whether the STB had protected the captive shippers as required under the Staggers Rail Act of 1980.

V. ARGUMENT

The Wheat and Barley Commissions appreciates the opportunity to address the Board on issues of paper barriers. The Wheat and Barley Commissions believe that competition is preferable to regulation. Competition is a necessary component for the development of innovation and efficient allocation of resources. Indeed safe, efficient, viable and innovative railroading as it does in all industries will come from effective competition within the industry. In the absence of competition, the STB needs to endeavor to seek ways to increase competition, not just in railroad mergers but in all proceedings where such increases in competition can be accomplished.

The railroads have already reduced their operating network by over 65,000 miles.

The railroads have stated that they gave many of these shortlines up because they were able to keep control through paper barriers.

It is easy to state that the paper barriers were part of consideration for the sale, but in reality what they are saying is if the Class I railroads cannot maintain absolute control over all of the lines they will simply abandon the line.

It is reality that paper barriers allow extension of the absolute control by railroads over lines it sells. Calling them ‘interchange commitments’ is pretty sophomoric – simply stated the interchange commitment is a one way street for the shortline – namely you give me all your business while I don’t allow you to expand your business base.

What this Board has to take into consideration is that Congress never envisioned that the ICC/STB would allow the massive concentration of economic

power that the ICC/STB have allowed to transpire and the clinging by the railroads to the concept of allowing them absolute control over the all railroad lines they have given up is not in the public interest. Furthermore, what paper barriers do is simply allow the dominant Class I to dominate their sold off lines.

As Wheat & Barley Commissions stated in their Opening Comments in this proceeding, the problem here is simple. When the shortlines are created they are created with a historic traffic base. The shortlines are in most cases, saddled with paper barriers which keep them from developing new traffic or expanding their traditional traffic. Yet, the Class I's through mergers are reaping the STB granted 'new' rights, efficiencies, increased revenues and increased captivity of many shippers, but the STB has not moved to provide protective conditions for the shortlines. The STB has not provided an avenue for shortlines to petition for retroactive protective conditions that should be due them.

The STB should consider that in any future rail mergers, the participating Class I's should remove all barriers to interstate commerce by canceling all shortline pricing restrictions and shortlines should be given the right to market all of their traffic without restrictions that have heretofore previously imposed such as paper barriers. The lifting of all previously imposed paper barriers will become one of the prices the merging railroad will have to incur in order to attain their merger goals.

NEW TRAFFIC

As Wheat and Barley Commissions stated in the AAR Shortline agreement, the agreement suggests that Short line should be able to develop without paper barriers – new traffic with another carrier. In theory, this sounds reasonable but in reality, the dominant carrier will always be able to claim that it can participate in the New traffic. The route may and in many does prove to be circuitous, but the AAR agreement allows the dominant carrier (and it has and does) claim that it is 'competitive' under its own internal economics. This Board should

not be fooled by this “New Traffic” plank. The agreement should state that any New Traffic a shortline can develop with another carrier cannot be interfered with by the dominant carrier – otherwise, this Board is sanctioning the continuation of monopoly interference in interstate commerce by the dominate and controlling carrier.

BASE TRAFFIC

The agreement also does not protect the shortline from traffic shifts by the dominant carrier of ‘base’ traffic. If the dominant carrier decides that it can develop another route for some of the base traffic, the shortline must have a method of recouping such actions. Developing new traffic, not subject to dominant railroad interference, is key to economic survival of the shortline system in this country. Protection by the STB is fully within it purview of the U.S. transportation policy.

VI. PAPER BARRIERS CREATE A BURDEN ON INTERSTATE COMMERCE

Paper Barriers by their definition by the Class I railroads, adversely affects interstate commerce. This STB utilizes this same concept ‘adverse affecting interstate commerce’ as the justifying circumstance for approving Class I rail abandonments. Furthermore, railroads cannot use contracts (paper barriers) to override antitrust laws or policies, even if the purchasing shortlines voluntarily agree.

Can this Board state unequivocally that shortlines subject to paper barriers have been allowed to pursue while restricted by paper barriers, full utilization of their facilities? The answer in the case of known shortlines in the central prairies is a resounding no. This gives rise the legal tenant that the Class I are creating

barriers to interstate commerce with their imposition and utilization of paper barriers.

The justification by Class I's for placing Paper Barriers on a shortline is that the line in question is being sold or transferred to the shortline for 'less than full market value'. However, the reason a Class I is transferring a line to a shortline is that the Class I can realize more net revenue by the transfer. It may because of a reduction of expenses, lower labor costs, etc. but no Class I ever gives one of their lines to a shortline if it expects to get less revenue than if the Class I retained ownership.

It is acknowledged by the Wheat & Barley Commissions that Class I's continue to provide the bulk of the 'hook and haul' business but that shortlines provide better overall service than traditional Class I's.

It is in the best interests of the rail industry to have a proactive policy to encourage the development of safe, efficient, viable and innovative shortlines in the U.S.

VI. WHEAT AND BARLEY COMMISSIONS CONTINUE TO BELIEVE THAT THE STAGGERS RAIL ACT AS PASSED BY CONGRESS IN 1980 SOUGHT TWO MAJOR OUTCOMES BUT THE REGULATORS HAVE CHOSEN THAT ONE HAS PRIORITY OVER THE OTHER

It is the view of the Wheat & Barley Commissions that when the Staggers Rail Act was passed Congress was seeking two major outcomes – 1.) by focusing on deregulation, the charge was to produce a stronger rail industry that was, at that time, plagued with multiple bankruptcies, and 2.) protecting of the captive rail customers from potential abuse that might occur due to decreased regulatory oversight and the inevitable consolidations that would occur in the future.

The results are clear. The trumping of the captive shipper protections by ever-present financial concerns of the ICC/STB has resulted in far less competition. The ICC/STB have approved rail merger after rail merger resulting in the most massive concentration of rail power over rail customers since the beginning of railroads in this country over 100 years ago.

The farm producers continued to be concerned that rail shippers (the parties bearing the freight rates) today are facing the effects of increasing railroad monopoly and market power coupled with ineffective rail regulation and a system that allows only baseball and the railroads to have anti-trust protection.

VII. THE RIA ONLY SERVES THE STRENGHTEN THE RAILROAD'S DOMINANCE IN THE MARKET PLACE

The RIA (Rail Industry Agreement) …. "The goal remains to improve shipper rail service while strengthening the rail industry." (RIA Page 4). Here is an industry characterized by the most massive concentration in the last 100 years, that states the goal is the strengthen the rail industry. Beyond the self-serving

nature of such a statement, it is questionable that the public interest continues to be served by a strengthening of the market power of the railroad industry.

What is missing from the RIA is the public and rail customer involvement. The Class I's continue to dominate all rail lines connected to them and the RIA will not allow development of any level of competition within the massively concentrated industry.

Again, the Board, in Ex Parte 582 Sub 1, was correct in their initial view that competition must be enhanced to serve the public interest. The railroads in their comments in the same proceeding wanted this Board to <u>not</u> consider 'downstream' effects in evaluation of future railroad mergers. Given that a two monopoly continent-wide railroad system will be the inevitable result of the next round of mergers, to not evaluate all downstream effects even if such evaluation involves speculation of future proposed mergers is too important not to be considered. The proposed look at downstream effects is what has been missing from national rail merger policy for the last 30 years. Surprises, we, the rail customers in this nation, are already faced with two railroads controlling thousands of rail customers. West of the Mississippi River, we have two major railroads controlling the lion's share of the traffic and east the Mississippi River, the same story. The public interest requires that the STB meet the needs of the rail customers by finally becoming a proactive force for enhancing competition. If the STB doesn't become proactive soldiers for enhanced competition, there may be nothing left for the STB to oversee. There is, in the market place, growing and continuing evidence of market power abuse and continuing abysmally poor levels of customer's service. The STB needs to be clear on its rules. The courts require it.

The STB should not be swayed by the railroads claim that the RIA adequately protects the public interests. Be mindful also that the RIA only applies to new business thereby excluding existing traffic. However, the original paper barriers does apply to existing business on the shortline in question.

VIII. DISCUSSION

After 25 years of ICC and STB rulemakings and adjudications that have produced very few protections for captive shippers, and no safe havens, and a railroad industry that is moving towards unprecedented dominance in the market place, a new regulatory environment vision needs to formulate. It should come as no surprise that most captive shippers regard recourse to the STB as, at best, a waste of time and effort, and at worst, a costly exercise in futility which is likely to lead to railroad retaliation than to reasonable rates or service.

If one takes a look at recent Board actions, they have changed the rules on rail customers. It is the duty of all common carrier railroads to provide and furnish transportation upon reasonable request. Further, all railroads have a common law duty to provide car service on reasonable request, and that includes "shippers located on branch or lateral lines of railroad, and [such shippers] are entitled to the same kind of treatment to those whose business is on the main line of the railroad."[1]. The Congress has made the common law duty to provide service on reasonable request, without undue discrimination, to all shippers a duty of national concern. In short, common carrier railroads are obligated to provide adequate transportation service on reasonable request. The railroad is expected to inform itself of shipper needs so that it can invest in sufficient transportation facilities to meet those needs[2]. While a temporary car shortage can be a defense, it is a defense only if the railroad has adopted a rule for distribution of available cars without discrimination. Alternatively if a rule has not been developed, the distribution is made without undue discrimination.

IX. WHERE TO FROM HERE?

This proceeding has produced plenty of evidentiary material to justify the Board initiating a rule making proceeding on paper barriers. That rule making proceeding by the Board should announce the STB's intention to not allow paper

[1] Chicago, R.I & P. Ry. Co. v. Sims, 256 S.W.33
[2] Illinois Central Railroad Co. v. River & Rail Co. & Coke Co., 150 S.W. 641: Anderson v. Chicago, M. & St. P. Ry. Co., 175 N.W. 246

barriers in all future line sales and the Board should use its mandates to not allow the Class I railroads to avoid competition through abandonment or deferred maintenance on short lines that could operate effectively without paper barriers.

Most importantly, the Board should propose regulations that phase out paper barriers in previously approved line sales, given the railroads record profits and the burden that such paper barriers are creating on interstate commerce.

Wheat & Barley Commissions were correct in predicting that the Class I railroads' comments in this proceeding would state that any change in any of these policies will condemn the railroad industry to financial ruin. They have been stating the same battle cry for years and it has been nonsensical for years especially given their financial strength in the marketplace. To the extent that reduced capacity in the transportation system as a whole leads to higher rates and charges on all rail traffic, captive and nonjurisdictional, the railroad industry no longer the anticompetitive conduct that supports stifling competition.

In any event, the choice facing the Board is not between minimizing rail-to-rail competition and maximizing rail-to-rail competition, rather the choice is looking at cases that allow a system of regulatory oversight that fosters competition.

We come to a time when public policy must be reexamined. The Wheat & Barley Commissions appreciate the opportunity to participate in this proceeding.

Respectfully submitted,

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